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No. 87-548

In the Supreme Court of the United States

OCTOBER TERM, 1987

TRANS WORLD AIRLINES, INC.,
Petitioner,

vs.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION OF CROSSOVER FLIGHT ATTENDANTS FOR LEAVE TO FILE AMICUS CURIAE BRIEF

AND

BRIEF OF AMICUS CURIAE CROSSOVER FLIGHT ATTENDANTS IN SUPPORT OF PETITIONER

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MOTION OF CROSSOVER FLIGHT ATTENDANTS FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

This Motion is filed by a group of approximately 500 Trans World Airlines ("TWA") flight attendants, collectively referred to as the Crossover Flight Attendants. Respondent Independent Federation of Flight Attendants ("IFFA"), the collective bargaining representative of the TWA flight attendants, called a strike against TWA in

1986. The Crossover Flight Attendants chose not to participate in the strike or returned to work during the strike. The Crossover Flight Attendants respectfully move the Court for leave to file a Brief *Amicus Curiae* supporting the position of Petitioner TWA. The names of the Crossovers on whose behalf this motion and brief are filed are listed in their *amicus curiae* brief filed with the Court in Case No. 86-1650.

The issue here is whether, after the strike ended, the Crossover Flight Attendants were protected against displacement by the flight attendants who refused to work during the strike, just as the permanent economic replacements hired during the strike were protected from displacement. The decision of the United States Court of Appeals for the Eighth Circuit, reported at 819 F.2d 839, would require TWA to displace many experienced Crossover Flight Attendants, even though inexperienced new hires are insulated from displacement.

The Crossover Flight Attendants present a unique viewpoint in this case. For many of them, their continued employment hinges on how the Supreme Court will rule. Under the decision of the Eighth Circuit, full-term strikers would displace many Crossovers, causing them to lose their jobs. The Crossover Flight Attendants represent the singular interests of the individuals with a great personal stake in this Court's decision. TWA, IFFA, and other *amici curiae* can present the issues from a traditional employer-union point of view, but they cannot profess to represent the particularly personal interests of the Crossover Flight Attendants, whose livelihoods are at stake.

TWA has consented to the filing of a Brief *Amicus Curiae* by the Crossover Flight Attendants. This Motion is made necessary by IFFA's refusal to give its consent.

For all of the reasons stated above, the Crossover Flight Attendants respectfully request leave to file the following Brief as *Amicus Curiae*.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE CROSSOVER FLIGHT ATTENDANTS IN SUPPORT OF PETITIONER

I. INTEREST OF AMICUS CURIAE

The interest of the *Amicus Curiae* is stated in the Motion preceding this Brief and is incorporated herein.

II. INTRODUCTION

The Court will doubtless receive briefs not only from TWA and IFFA, but also from numerous other *amici curiae*, and these briefs will in all probability address the issues in terms of employer *vs.* union. Given that fact, one could forget the people whose jobs are at stake here: the Cross-

overs. This case involves not just dollars and cents, but the jobs of people who have suffered unrelenting abuse for lawfully choosing to remove (as they thought) the threat of their replacement by TWA, by returning to work, crossing a picket line established by a union which they believed no longer had their best interest at heart. The ruling of the Eighth Circuit would deny many of the Crossovers the right to earn their livelihoods.

The Crossovers' jobs hang in the balance. TWA and IFFA have stipulated that many of the Crossovers are junior in seniority to full-term strikers. Stipulation No. 27, Petition for Writ of *Certiorari*, at 61a. If the Court affirms the Eighth Circuit's aberrant ruling, the junior Crossovers will be removed from their jobs, irreparably disrupting their lives and families.

III. ARGUMENT

A. The Denial of Protected Status to the Crossover Flight Attendants Deprives Them of the Effective Exercise of Their Statutory Right Not to Engage in Concerted Activity.

For many years the Supreme Court has shown great sensitivity to the right of employees to make free choices in deciding whether to support or oppose union efforts against employers. The ruling of the Eighth Circuit in this case would eviscerate this Court's holdings that free choice is the rule which must govern all employee decisions to engage in union activity. That ruling would eliminate the principal reason for an employee either to refuse to join a strike or to return to work during a strike: the preservation of his job.

Each of the Crossovers made the difficult decision to cross a picket line of co-workers. Writing for the majority in *NLRB v. Granite State Joint Board,* 409 U.S. 213 (1972), Mr. Justice Douglas acknowledged the difficult personal decision faced by every employee who considers abandoning a strike:

> Events occurring after the calling of a strike may have unsettling effects, leading a member who voted to strike to change his mind. The likely duration of the strike may increase the spector of hardship to his family; the pace with which the employer replaces the strikers may make the strike seem less provident.

Id. at 217.[1]

Since its inception, the Railway Labor Act, 45 U.S.C. §151 *et seq.* ("the RLA"), has protected the rights of carriers' employees, such as the Crossovers, to decide whether or not to support labor organizations: "[t]he purposes of the [RLA] [include]: . . . (2) to forbid any limitation upon freedom of association among employees." RLA Section 1, 45 U.S.C. §151a. Under the National Labor Relations Act, 29 U.S.C. §151 *et seq.*, this Court has explicitly recognized the statutory right of employees to choose not to engage in concerted activity such as a strike. *Pattern Makers' League of North America v. NLRB,* 473 U.S. 95, 105 S.Ct. 3064, 3068 (1985).

In implementing the free choice granted employees by the federal labor laws, the federal courts have cor-

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1. With respect to the "protected status" of crossovers, why did *Granite State* state that strikers would consider returning to work to protect against their replacement by newly-hired employees, if crossing the picket line did not protect their post-strike employment vis-a-vis unreinstated full-term strikers?

rectly determined that employees must be free from pressures which would act to deny *effective* exercise of that right to choose freely. For example, in *Pattern Makers' League* the Supreme Court found reasonable a National Labor Relations Board decision that the NLRA prohibits any union rule preventing employees from resigning from union membership at any time, including during a strike. As a result, the Court approved the NLRB's decision that a union could not justify fining employees who resigned from the union and returned to work during a strike, by relying on a union rule against resignations at that time. The union's attempt to fine the employees violated the NLRA because it abridged their full and effective exercise of NLRA Section 7 rights. *Id.* 473 U.S. at ....., 105 S.Ct. at 3076. Implicit in the Court's reasoning is the understanding that a union rule against resignation, although not itself preventing employees from crossing a picket line, effectively denies unfettered exercise of the employees' statutory rights by acting as a deterrent to their free choice.

Union fines against an employee returning to work during a strike are also unlawful, if the employee has lawfully resigned from the union. As the Court observed in *NLRB v. Granite State Joint Board,* 409 U.S. 213, ". . . when a member lawfully resigns from the union, its power over him ends." *Id.* at 215. In that case, the union attempted to fine employees who resigned union membership and abandoned a strike. The Court found the imposition of fines on those employees would, to quote an earlier decision concerning the power of unions to impose fines, " 'invade[ ] or frustrate[ ] an overriding policy of the labor laws . . .' " *Id.* at 216, quoting *Scofield v. NLRB,* 394 U.S. 423, 429 (1969). The "overriding

policy of the labor laws" violated by the union in *Granite State* was the right of employee free association guaranteed by NLRA Section 7. *Granite State Joint Board,* 409 U.S. at 218 (Burger, C.J., concurring).

The Eighth Circuit's ruling here would specifically deny the Crossovers the right to exercise *effectively* their power to refuse to participate in the strike against TWA. If a union's refusal to accept a crossover's membership resignation, or its attempt to impose a fine on the crossover, violates the crossover's statutory right to refrain from concerted activity, a union effort to deny the crossover a job is equally coercive, if not more so.

If this Court adopts the Eighth Circuit's reasoning that strikers may displace crossovers on a seniority basis (even though no provision in the TWA-IFFA collective bargaining agreement or the RLA requires reinstatement to vacancies after a strike in order of seniority), striking employees would be put to the Hobson's choice of resigning their jobs and seeking employment as newly-hired permanent replacements, thereby throwing away the benefits accrued from their seniority. Clearly, that is no real choice; it is a coercive denial of the employee's right not to strike.

If employees have the right to refuse to take part in or support a strike, as is clearly the case under both the NLRA and the RLA, they must be free to exercise that right by returning to work, as the Crossovers did here. Strikes are not without risk to strikers and their union. Striking employees risk losing their jobs to replacements if the employer is able to prevail in the strike. However, the Eighth Circuit's decision would increase that risk, by effectively ending the incentive for strikers to return to

work before the union chooses to end the strike. This would place all strikers at the mercy of the union leadership, a result hardly contemplated by the RLA or NLRA.

B. Protecting Crossovers From Displacement at the End of a Strike Properly Accords Them Equivalent Status With Newly-Hired Permanent Economic Replacements.

The Eighth Circuit's decision is an unprecedented and unprincipled attempt to deprive the Crossovers of their jobs, even though there is no substantive difference between the situation of the Crossovers and that of the new hire replacements, whose jobs are protected. The Crossovers and new hires should be accorded equal status.

The Eighth Circuit's unprecedented decision undermines the careful balance between employers and economic strikers maintained by this Court since its decision in *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938). The courts have long recognized a balance of rights between employers and economic strikers: employees may strike for better wages, hours, and working conditions and their employer remains free to operate its business during a strike. In *Mackay*, the employer offered permanent employment to those who replaced its economic strikers. The Court found that an employer can lawfully "replace . . . striking employees with *others* in an effort to carry on the business" and that the employer need "not . . . discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them." *Id.* at 345-46 (emphasis added). The Court reasoned that while discharging or otherwise discriminating against economic strikers tips

the balance too far in favor of the employer, offering and providing permanent employment to those who replace economic strikers maintains the balance. The Court drew no distinction between the types of replacements who may replace strikers, *i.e.*, crossovers or new hires.

In *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), the Court held that an award of super-seniority to new hires and crossovers unlawfully discriminated against those who took part in the strike. The super-seniority award would have insulated the new hires and crossovers against future layoffs, as against reinstated full-term strikers who had greater pre-strike seniority. *Id.* at 231-33. The Court found that although the employer's interest in maintaining and operating its business outweighed the damage to concerted activities caused by permanently replacing strikers, a different result was necessary when the employer offered the inducement of "super-seniority *in addition to* permanent replacement." *Id.* at 232 (emphasis added).

In purporting to apply *Mackay* and *Erie Resistor*, the Eighth Circuit held in this case that the Crossovers had no protection against displacement by senior full-term strikers, even though the newly-hired replacements were protected. The Eighth Circuit's reading of *Erie Resistor* is clearly contrary to the rulings of this Court and of other Courts of Appeals. Where a court has found an employer guilty of treating full-term economic strikers discriminatorily, the crossovers have received benefits from the employer beyond the mere assurance of a job when the strike ended. In other words, the illegal conduct was that the crossovers were given something vis-a-vis reinstated strikers that they did not have before the strike began.

The decisions of the Courts of Appeals demonstrate that tangible benefits to crossovers, beyond permanency, are necessary before an employer is guilty of interfering with an employee's free and uncoerced choice to return to work or remain on strike. For example, in *NLRB v. Rubatex Corporation*, 601 F.2d 147 (4th Cir. 1979), *cert. denied*, 444 U.S. 928 (1979), the Fourth Circuit held that an employer cannot give bonuses only to crossovers and nonunion employees who worked during a strike, under the rationale that these employees helped the company preserve its reputation. The Fifth Circuit in *NLRB v. Moore Business Forms, Inc.*, 574 F.2d 835 (5th Cir. 1978), held that after the termination of a strike, an employer may not permanently assign strikers to less desirable shifts and crossovers and new hires to more desirable shifts, when before the strike the company policy had been to rotate shifts. The Ninth Circuit in *NLRB v. Swedish Hospital Medical Center*, 619 F.2d 33 (9th Cir. 1980), held that the compensatory day off given to crossovers to reward them for added stress during the strike was discriminatory.

However, the Eighth Circuit has determined that offering to employees what they had before, to wit, a job, is an unlawful inducement to quit a strike. This is a curious holding from the same Circuit that paraphrased *Mackay* as deciding that "an employer is entitled to solicit replacements by guaranteeing them a measure of permanence, *even though as a result strikers may be induced to abandon a strike to avoid being replaced.*" *Randall, Division of Textron v. NLRB*, 687 F.2d 1240, 1246 (8th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983) (emphasis

added).[2] Moreover, the Eighth Circuit in *Randall* cited with approval *Giddings & Lewis, Inc. v. NLRB*, 675 F.2d 926 (7th Cir. 1982), which held that layoffs of crossovers and permanent replacements after the termination of a strike do not create vacancies to which unreinstated strikers are entitled to return when the employer decides to order a recall. *Randall*, 687 F.2d at 1247.

The Eighth Circuit's decision also unfairly differentiates between new hires and crossovers, the former being permanent replacements under its decision, and the latter simply employees. Under this decision, a striker with twenty years' seniority could displace a crossover with nineteen years' experience, but not a new hire with but one day on the job. According to the Eighth Circuit, permanent status apparently is only for the new employees hired during the strike, not the prestrike employees who returned to work during the strike. In other words, a crossover with less seniority than the strikers, but still more than the new hires, will be forced to "resign" and apply for work as a new hire, if he or she wishes to retain a job when the strike ends.

The Eighth Circuit's distinction between permanent replacements and crossovers runs counter to the decisions of other Circuits. For example, the Second Circuit in *Lodges 743 and 1746, etc. v. United Aircraft Corporation*, 534 F.2d 422 (2nd Cir. 1975), *cert. denied*, 429 U.S. 829 (1976), held that those employees who were absent during an economic strike out of fear of violence did not voluntarily incur a risk of loss of their jobs, and could be

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2. The Eighth Circuit's decision becomes even more incredible when one recalls that the very replacements at issue in *Mackay* were crossovers.

accorded status superior to that of employees who actively took part in the strike. Thus, the employer's reinstatement of the nonstrikers before the reinstatement of the strikers was not unlawful discriminatory treatment. In *NLRB v. Transport Company of Texas*, 438 F.2d 258 (5th Cir. 1971), the Fifth Circuit held that an employer could refuse to reinstate economic strikers if the employee complement was filled by nonstrikers and new employees hired during the strike. When the strike ended and the strikers applied for reinstatement, the employer recalled only enough strikers to fill the number of employees needed. The nonstrikers and new hires were not displaced. In *NLRB v. Harrison Ready Mix Concrete, Inc.*, 770 F.2d 78 (6th Cir. 1985), the Sixth Circuit considered an economic strike in which nine employees crossed the picket line and fifteen new employees were hired before the end of the strike. The court stated that two employees who crossed the picket line (but were among the last to do so) were not treated discriminatorily when they were not given full-time jobs, because the employer had a sufficient business justification to refuse to reinstate them in light of the low work demand at that time. *Id.* at 80. In other words, even though these employees were senior to the employees who crossed the picket line first, the employer need not displace those employees for them. Indeed, the court stated that the employer was not compelled to displace any of the employees who worked during the strike to make room for the returning strikers. *Id.*

TWA was not acting discriminatorily when it refused to displace the Crossovers for returning strikers. It was not discrimination against the strikers for TWA to accept the Crossovers' decisions to return to work and to refuse to reinstate strikers solely by seniority. (TWA had told

all strikers they would be reinstated if they returned to work during the strike, if vacancies were available). Indeed, as the Sixth Circuit stated in *NLRB v. American Olean Tile Co.*, 826 F.2d 1496 (6th Cir. 1987), there is no right to recall according to seniority in the absence of such a provision in a collective bargaining agreement or a binding past practice. In the absence of such a right, an employer may establish a new recall procedure so long as it is "applied consistently." *Id.* at 1500, citing *Lone Star Industries, Inc.*, 279 NLRB No. 78 (1986), *enf. denied*, 125 LRRM 3063 (1st Cir. 1987).

In *American Olean*, the employer used a chronological list of employees who offered to return during the strike to fill vacancies that arose after the strike. The court found that the employer did not use the list "with the purpose of discriminating against those most active in the union." 826 F.2d at 1502. In the case at hand, as in *American Olean*, there is no provision in the collective bargaining agreement which requires TWA to reinstate the economic strikers according to seniority when openings become available. These Crossovers were not unlawfully induced by the fact that they believed they would have a job when the strike terminated—they already had jobs before the strike. Indeed, the Crossovers were not even promised the same job that they had before the strike; they only expected to work where they were needed.[3] In

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3. The Eighth Circuit below cites with approval *George Banta Co. Inc., Banta Div. v. NLRB*, 686 F.2d 10 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983), which held that the employer committed an unfair labor practice when it assigned each crossover the job classification and wage rate held by the employee before the strike regardless of the company's production requirements on the work actually performed by the employee during the strike. The case below is distinguishable on several grounds, including the fact that TWA only offered "a" job, not the "same" job.

some cases the job they received post-strike was less desirable than the job they had before the strike.

The Eighth Circuit's decision is without support in the law or underlying policy. The Crossovers had a right to be reinstated when they offered to return to work, since there were vacancies which TWA could have filled by hiring new employees. The Crossovers exercised free choice in returning to work, desiring nothing more than what the Eighth Circuit has conceded to the new hires: jobs at the end of the strike. That protection is in accord with the rulings of this Court and the other Circuits, and acknowledges the proper status of employees who choose not to engage in concerted activity.

C. Policy Considerations Counsel in Favor of Recognizing That Crossovers and Permanent Replacements Should Have Equivalent Employment Security.

The Crossovers made one of the most difficult decisions of their lives when they decided to continue performing their jobs for TWA. The Eighth Circuit's decision radically changes the balance of labor relations by depriving the Crossovers of free choice. The Crossovers and newly-hired replacements should be accorded equivalent status as against the full-term strikers.

What can an employee do if he or she does not want to support a strike? The Eighth Circuit would say, "Very little." If the employee refuses to strike or returns to work after the strike begins, he or she will be displaced by senior strikers when the strike ends and will be rehired only in seniority order. Effectively, the nonstriker will only be holding a job for a striker.

The only alternative for the employee who does not want to engage in the strike and who, naturally, wants to continue to work beyond the end of the strike, carries a totally unacceptable and unreasonable price tag. That alternative requires the employee to resign his or her position with the Company and then reapply in the hope of being hired as a new employee and permanent replacement. Thus, the price of not striking is the loss of all seniority and corresponding pay and fringe benefits—the Hobson's choice noted in Section III(B) above.

The policies cited by the court below in favor of its decision do not withstand analysis. That court decided that nonstrikers should not be treated as permanent replacements because such treatment would (a) discriminate among employees on the basis of union activity, (b) induce employees to abandon the strike, and (c) likely create long-term conflict and division in the workforce. To respond to these inadequate reasons in reverse order, the workforce will suffer infinitely greater long-term conflict and division under the Circuit's rule when the strike ends and senior strikers suddenly replace junior nonstrikers and begin working side-by-side with newly-hired permanent replacements. The returning strikers' bitterness and resentment toward the new hires is predictable and the simultaneous return of a large number of strikers will greatly increase the tension.

Second, the Circuit does not merely eliminate an inducement for employees to return to work. Rather, it eliminates the option for employees to refuse to engage in concerted activity, drastically penalizing employees who would dare to exercise their statutory right of refusal.

Finally, there was no discrimination against the full-term strikers on the basis of union activity, but simply a reinstatement of the Crossovers to vacancies which existed when they offered to return to work. The full-term strikers made no such offer to return.

IV. CONCLUSION

The Crossovers urge the Court to reverse the decision of the Eighth Circuit because it deprives the Crossovers of their right to refuse to engage in concerted activity and will force several hundred of the Crossovers out of their jobs. IFFA and its striking members assumed the risk of losing the strike; the Eighth Circuit's decision, if allowed to stand, would remove all risks to a union in deciding to strike and allow the union to impose its will on all employees, even those who do not wish to strike.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Motion for Leave to File and Brief of *Amicus Curiae*, Crossover Flight Attendants in Support of Petitioner, were mailed by first class mail, postage prepaid, to John R. Hurley, Esq., 204 West Linwood Blvd., Kansas City, Missouri 64111, Counsel of Record for Respondent Independent Federation of Flight Attendants, and Murray Gartner, Esq., 300 Park Avenue, New York, New York 10022, and Paul E. Donnelly, Esq., P.O. Box 19251, Kansas City, Missouri 64105, Counsel for Petitioner Trans World Airlines, this 26th day of May, 1987.